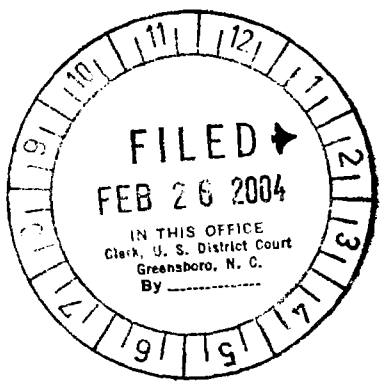
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GARY C. CLEMENT Plaintiff, v. UNC HOSPITALS, /MR. ERIC MUNSON, CEO, EMPLOYEE RELATIONS, HUMAN RESOURCES, THE CRITICAL CARE SERVICE Defendants.	)	Case No. 1:02CV1017



MEMORANDUM OPINION

TILLEY, Chief Judge

This matter is now before the Court on Defendant Munson's uncontested Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1), (2), and (6), and to Stay all Discovery Pending Resolution of the Motion to Dismiss [Doc. #6]. For the reasons set forth below, Defendant's Motion to Dismiss will be GRANTED because this Court lacks subject matter jurisdiction; and, Defendant's Motion to Stay Discovery is therefore MOOT.

I.

On November 22, 2002, Mr. Gary S. Clement, an employee of the UNC Health Care System, filed a pro se Complaint in the Middle District of North Carolina. [Doc. #1]. The Complaint alleges several violations of Title VII, 42 U.S.C. § 2000e, et seq., including discrimination based on race and sex, sexual

harassment, and retaliation. It is unclear exactly which parties were intended to be defendants in the action. However, only Eric Munson, Chief Executive Officer of the UNC Hospitals, was served with a summons and the Complaint.[1] Because the time period allowed for proper service has expired, no other potential defendants may now be served. Therefore, the only possible defendants are (1) Mr. Munson in his individual capacity; (2) Mr. Munson in his representative capacity (as Chief Executive Officer of UNC Hospitals); and (3) UNC Hospitals (as represented by Mr. Munson).[2] For reasons discussed below, this Court does not have subject matter jurisdiction over Mr. Clement's claims, and further discussion regarding the intended defendant(s) is unnecessary.

On April 10, 2003, Mr. Munson filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1), (2), and (6), and to Stay all Discovery Pending Resolution of the Motion to Dismiss [Doc. #6]. Subsequently, Mr. Clement filed several responses. However, all filings were either stricken for failure to comply with applicable rules or were untimely. Therefore, Mr. Munson's Motion to Dismiss will be considered uncontested. See Local Rule 7.3(k). Under Rule 7.3(k) an uncontested motion properly may be granted without further notice to the party

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[1]Mr. Munson was served on March 5, 2003. [Doc. #2].

[2]Fed. R. Civ. P. 4(j)(2) provides that "[s]ervice upon a state, municipal corporation, or other governmental organization subject to suit shall be effectuated by delivering a copy of the summons and of the complaint to its chief executive officer . . . ."

who had failed to file a timely response. Nonetheless, given the Court's heightened duty to pro se plaintiffs, the mertis of Defendant's Motion to Dismiss will be addressed.

II.

Mr. Munson first requests that the Court dismiss Mr. Clement's claims pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Because it is determined that this Court does not have proper jurisdiction, addressing Mr. Munson's other grounds for dismissal is unnecessary.

Federal courts are courts of limited jurisdiction; they can hear only cases authorized by the Constitution or by statute. See U.S. Const. Art. 3 § 2; 28 U.S.C. §§ 1330-1368. Here, the Complaint states that the action is brought pursuant to Title VII of the Civil Rights Act. Therefore, the alleged basis for subject matter jurisdiction is federal question jurisdiction under 28 U.S.C. § 1331.

One way in which subject matter jurisdiction based on federal question may be challenged is by contesting the factual basis for jurisdiction, alleging that the jurisdictional facts alleged in the complaint are not true. Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). In such a case, the plaintiff has the burden of proving jurisdiction, and the court may go beyond the face of the complaint and consider evidence without converting the motion into one for summary judgment. Id.; see also Richmond, Fredericksburg & Potomac R. Co. v. U.S., 945 F.2d 765, 768 (4th Cir. 1991).

Here, the essence of Mr. Munson's jurisdictional challenge relies on an assertion that the jurisdictional facts alleged within the Complaint are not true. Therefore, Mr. Clement has the burden of proving jurisdiction, and evidence beyond the face of the Complaint may be considered in deciding Mr. Munson's Motion to Dismiss. Specifically, Mr. Munson claims that jurisdiction is not proper because Mr. Clement did not file a timely charge with the Equal Employment Opportunity Commission (EEOC) prior to instituting this action. Mr. Munson bases this argument on his contention that Mr. Clement filed a charge with the EEOC on April 22, 2002. Mr. Munson supports this allegation by attaching a copy of Mr. Clement's EEOC charge that is clearly dated April 22, 2002. However, the face of the Complaint states that Mr. Clement filed a charge with the EEOC on October 25, 2001. Because, Mr. Munson challenges a jurisdictional facts alleged within the Complaint, evidence beyond the face of the Complaint will be considered.

A complainant wishing to bring suit under Title VII must first file a charge with the EEOC within 180 days of the complained-of practice.[3] 42 U.S.C. § 2000e-5(e)(1). Otherwise, a Title VII suit based upon the complained-of practices will be time-barred. The only way claims based on incidents outside of the 180-day period will not be time-barred is if "they can be related to a timely incident as a

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[3]The complainant will have 300, instead of 180, days within which to file with the EEOC if he takes advantage of any applicable state or local agency proceedings that are available to him. No such proceedings are relevant in this case.

'series of separate but related acts' amounting to a continuing violation. Beall v. Abbot Laboratories, 130 F.3d 614, 621 (4th Cir. 1997), citing Jenkins v. Home Ins. Co., 635 F.2d 310, 312 (4th Cir. 1980) (per curium). In other words, if a plaintiff can show that an act occurring within the 180-day period was related to acts preceding that period, those preceding acts may be considered as part of the claim under a "continuing violation" theory.

In Beall, the plaintiff's sexual harassment claim was time-barred because the only incident alleged to occur within the 180-day period was "insufficient to give rise to a claim of harassment." Id. The plaintiff was not permitted to rely on incidents occurring outside the statutory period because "no timely violation had been alleged." Id. at 621; see also Woodard v. Lehman, 717 F.2d 909, 915 (4th Cir. 1983) ("[i]t is only where an actual violation has occurred within [the 180-day] time period that under any possible circumstances the theory of continuing violation is sustainable).

In the case at hand, Mr. Clement alleges in his Complaint that he filed charges with the EEOC on October 25, 2001. However, Mr. Clement provides no support for his allegation, which is contradicted by the copy of his EEOC charge provided by Mr. Munson. This copy clearly indicates that the EEOC charge was filed on April 22, 2002. The only incidents alleged to have occurred within the 180-day period preceding the date of the charge, April 22, 2002, are described in the charge as follows:

> From June 2001 and continuing through April 13, 2002, I have been harassed by the Registered Nurses in Surgical and Neurosurgical Intensive Care Units in that I have been belittled, intimidated and humiliated.
>
> According to the Nurses, I have been harassed because they feel that I am not good at my job. I am the only employee treated this way.

Therefore, the issue is whether these events are sufficient to give rise to claim of harassment.

In Beall, the relevant incident involved the plaintiff's employer yelling at her in a "unpleasant and . . . cruel" fashion. 130 F.2d at 620. The court found that this did not rise to the level of illegal harassment, because "Title VII simply does not guarantee freedom from insensitive remarks that do not create an objectively abusive work environment. Id. at 620-21.

As in Beall, the incidents alleged in Mr. Clement's EEOC charge are "insufficient to give rise to a claim of harassment." Title VII does not protect employees from harsh treatment from employers or other employees that stems from reasons other than impermissible considerations. The Fourth Circuit has made clear that "[t]he list of impermissible considerations within the context of employment practice is both limited and specific: 'race, color, religion, sex or national origin.'" Holder v. City of Raleigh, 867 F.2d 823, 826 (4th Cir. 1989) (citation omitted). Clearly, being or being perceived as "not good at [one's] job" is not an impermissible consideration under Title VII. Therefore, Mr. Clement's EEOC charge did not allege an incident, that could be considered an actual violation of

Title VII, occurring within the 180 days preceding its filing.

Because Mr. Clement has not alleged an actual violation occurring within the 180-day statutory period, the continuing violation theory is not available to him. Therefore, claims based on the incidents occurring more than 180 days before April 22, 2002 are time-barred. Because Mr. Clement may not bring suit under Title VII, there is no federal question jurisdiction, and Mr. Munson's Motion to Dismiss for Lack of Subject Matter Jurisdiction will be GRANTED. As a result, there is no need to address Mr. Munson's additional stated grounds for dismissal.

III.

In conclusion, Defendant's Motion to Dismiss will be GRANTED on the grounds that subject matter jurisdiction is not proper in this Court. Defendant's Motion to Stay Discovery is therefore MOOT.

This 26th day of February, 2004

United States District Judge